

a RE WAN HAI HING, EX P CHONG WAI WAH & ANOR

HIGH COURT MALAYA, SHAH ALAM

CHIN FOOK YEN J

[BANKRUPTCY NO: 29-3424-97]

27 APRIL 1999

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BANKRUPTCY: *Notice - Issue of - Whether can be issued in names of two or more creditors - Whether only one creditor may issue notice - Bankruptcy Act 1967, s. 3(1)(i) - Interpretation Acts 1948 & 1967, s. 4(3)*

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BANKRUPTCY: *Notice - Costs - Judgment obtained with costs to be taxed - Whether notice can be issued for judgment sum without costs - Whether costs can be included*

BANKRUPTCY: *Notice - Interest - Notice did not include interest - Whether notice incomplete and invalid*

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This was an appeal from the receiving and adjudication orders made by the deputy registrar against the appellant debtor upon a petition in the names of both the applicants. The applicants were the undivided registered owners of a piece of land who had successfully applied to remove a caveat lodged by the appellant, whereupon damages were awarded to the applicants. The appellant challenged the validity of the bankruptcy notice and the issues for determination were: (a) whether two or more judgment creditors could issue a bankruptcy notice; and (b) whether the bankruptcy notice was incomplete as it did not include the costs to be taxed as well as the interest on the judgment debt.

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Held:

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[1] Although s. 3(1)(i) of the Bankruptcy Act 1967 ('the BA') uses the phrase "a creditor" in singular fashion, s. 4(3) of the Interpretation Acts 1948 and 1967 clearly provides that "Word and expressions in the singular include the plural." It follows therefore that two or more judgment creditors can issue a bankruptcy. Hence, the bankruptcy notice issued in the names of both the applicants was valid.

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[2] Where a judgment has been obtained for a certain sum with costs to be taxed, a bankruptcy notice can be issued for the amount of the judgment without the costs. Costs cannot be included or separately relied on until they have been taxed. This principle is also applicable in respect of interest on judgment debts.

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[Appeal dismissed with costs.]

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Case(s) referred to:

Low Mun v. Chung Khiaw Bank Ltd [1988] 1 MLJ 265 (**fol**)

Michael Chong Ngian Fong v. Sykt Fong Sam Timber & Anor [1977] 1 MLJ 263 (**not fol**)

Re Farrugia, ex p Deputy Commissioner of Taxation (1988) 80 ALR 651 (**fol**)

Re GJ, ex p GJ [1905] 2 KB 678 (**fol**)

Re Hill [1921] 2 KB 831 (**fol**)

Legislation referred to:

Bankruptcy Act 1967, ss. 3(1)(i)

Interpretation Acts 1948 & 1967, ss. 2(3), 4(3)

Rules of the High Court 1980, O. 42 r. 12

For the judgment debtor - Paul Ong; M/s Paul Ong & Assoc

For the judgment creditor - PC Neoh; M/s Suhaimi Khor Zulkifli & Chang

Reported by Farah Naim

JUDGMENT**Chin Fook Yen J:**

This is an appeal from a receiving order and adjudicating order made by the Deputy Registrar against the debtor on a petition in the names of two persons (the applicants). The applicants, as far as I can gather from the record, were the undivided registered owners in equal shares of a piece of land against which the debtor had earlier lodged a caveat. The applicants, as plaintiffs, had together applied successfully for the removal of the caveat. Thereupon, damages were awarded to the applicants against the debtor and were subsequently assessed at RM19,479.14 and costs to be taxed in favour of the applicants in both their names. On the hearing of the appeal before me, counsel for the debtor argued on three grounds, but eventually submitted on two grounds only, abandoning the third ground. They were as follows:

First ground: It was submitted that the bankruptcy notice dated 12 December 1997 was misconceived, in that it was issued in both the applicants' names. As such it was fatally flawed. It was the contention of the counsel that only one applicant could have applied, not both of them together, for the issue of the bankruptcy notice and therefore, the bankruptcy notice issued in both the applicants' names was invalid. He referred to the case of *Michael Chong Ngian Fong v. Sykt Fong Sam Timber & Anor* [1977] 1 MLJ 263 in support. Among other things, this was what the learned judge said at p. 264:

a But then there was a serious fundamental defect of a different kind in the bankruptcy notice which was issued by the petitioning creditors against the debtor which rendered the notice invalid and of no effect and that defect was that the bankruptcy notice was issued not at the instance of one creditor but two creditors. Under s. 3(1)(i) of the Bankruptcy Act 1967 a bankruptcy notice may be issued against a debtor at the instance of one and only one creditor on a final judgment or final order. I think there could have been no objection to the bankruptcy notice if it had been issued by only one of the two creditors based on the amount of money due to that creditor in the judgment of April 21, 1975 but the issue of the bankruptcy notice jointly by both the judgment creditors rendered the notice bad and irregular.

c He continued with his *ratio decidendi* as follows:

d The bankruptcy petition which follows after a debtor has committed an act of bankruptcy is on a different footing. The bankruptcy petition unlike the bankruptcy notice may be presented to the court by one or two or more creditors under section 5(1)(a) of the Bankruptcy Act. This section and the form in the Appendix to the Bankruptcy Act relating to a creditor's petition provide for the presentation of the petition by one or several creditors while section 3(1)(i) and the forms prescribed for the issue of a bankruptcy notice and the request for the issue of a bankruptcy notice speak of only one creditor. The provisions of sections 3(1)(i) and 5(1)(a) of the Bankruptcy Act, rule 91(2) and (3) of the Bankruptcy Rules and the relevant forms prescribed in the Appendix to the Act are to be construed literally.

e With the greatest respect, I am unable to agree with his view. To begin with, s. 3(1)(i) of the Bankruptcy Act 1967 ('Act'), no doubt, does mention the words "a creditor" in singular number. But s. 4(3) of the Interpretation Acts 1948 and 1967 ('the Interpretation Acts'), clearly provides that "words and expressions in the singular include the plural, ...", subject to s. 2(3) of the Interpretation Acts. Similarly, the same can be said for Form 4, the request for issue of Bankruptcy Notice as prescribed by the Bankruptcy Rules. Speaking of literal construction, in the instant case, the applicants' registered interest in the land was undivided, to the very cent of it. It will be an absurdity to exclude the application of s. 4(3) of the Interpretation Acts that the singular would include the plural. Surely, s. 2(3) of the Interpretation Acts is not intended to exclude the application of s. 4(3) of the same Acts in the circumstances of the case. That apart, I also find support for my view in the case *In re Hill* [1921] 2 KB 831. In that case judgment was obtained in the name of a firm of Holt & Co., then consisting of four partners. Subsequently, one of the partners retired. Thereafter, a bankruptcy notice was issued at the request of "Holt & Co.". At this time there were only three partners left. The issue decided there was that on the retirement of a partner, the persons entitled to enforce the judgment were still the members of the firm of Holt & Co. The proceedings were considered perfectly regular. It was held that:

The firm of Holt & Co. originally consisted of four members and the surviving or continuing partners of the firm were quite at liberty to issue the bankruptcy notice and to present that petition.

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The issue before me is whether two or more judgment creditors can issue a bankruptcy notice. In that case the firm of Holt & Co. issued the bankruptcy notice. The court there not only did not object to the firm being the applicant, but also in fact decided that the continuing partners were at liberty to have done so. A firm has no legal entity. It is only a conventional mode of designating the persons composing it. By implication, if, therefore, the partners of a firm can issue a bankruptcy notice, as decided in that case, I am of opinion that the bankruptcy notice issued in the instant case in both the applicants' names is valid and the petition presented to that extent is also valid.

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Second ground: The objection here was that the amount claimed in the bankruptcy notice did not include the costs to be taxed, as well as the interest to which every judgment was entitled to carry pursuant to O. 42 r. 12 Rules of the High Court 1980. It was submitted, therefore, the bankruptcy notice was incomplete. In the event that the judgment creditor wished to forego the other items, the waiver must be clearly stated in order not to mislead or embarrass or perplex the debtor. There should not be repeated claim subsequently. For ease of reference the relevant portions of the judgment obtained which was produced in the request for issue of bankruptcy notice and the bankruptcy notice issued are reproduced below. The judgment ordered:

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ADALAH DENGAN INI DIHAKIMI bahawa Defendan membayar Plaintiff RM19,479.14 **dan kos ditaksirkan.** (emphasis added)

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And the bankruptcy notice issued herein claimed:

the sum of RM19,479.14 claimed by them as being the amount due on the judgment obtained by them

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A number of cases had been referred to during the submission on both sides before me. In those cases the claim, *inter alia*, included interest which was never properly calculated. I find them not helpful. In our case here, the judgment debt given was RM19,479.14 and the bankruptcy notice had claimed the judgment debt alone, without including the statutory interest and the costs awarded which had still not been taxed. The basic facts here fall squarely with the case of *In re G.J. Ex parte GJ* [1905] 2 KB 678 CA, which decision will certainly help to resolve the issues for determination here. In that case, the plaintiff in an action in the King's Bench Division recovered judgment against the defendant for "1500l. **and**

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- a* **costs to be taxed.”** (emphasis added). Before the costs had been taxed the creditor served on the debtor a bankruptcy notice claiming payment of 1500I. alone. On the hearing it was objected on behalf of the debtor that the bankruptcy notice was bad because it did not require payment in accordance with the terms of the judgment, in as much as it required
- b* payment of the 1500I. without mentioning the costs. It was further contended that a creditor could not split a judgment debt into two and serve a bankruptcy notice in respect of part of the debt, unless he abandoned the other part with clear indication. Lastly, it was submitted that there was not a final judgment until the costs had been taxed. As can be seen above,
- c* the grounds argued there were substantially the same before me. We know that to support a bankruptcy notice there must be a final judgment. That apart, it is also essential that at the time of issue of bankruptcy notice, the creditor must be in a position to issue execution (see *Low Mun v. Chung Khiaw Bank Ltd* [1988] 1 MLJ SC at p. 265). In *re G.J. (supra)* Vaughan Williams LJ had this to say about a “final judgment”.
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- What has been held essential to constitute a ‘final judgment’ within sub-s. 1(g) is that there must have been something amounting to a cause of action which has been dealt with on the basis of a cause of action, at any rate to this extent, that the debtor has had the opportunity of setting up a counter-claim, set-off, or cross-demand. And, if the debtor has not had the opportunity of doing that, the judgment or order does not come within the term ‘final judgment’ as used in sub-s. 1(g)” of the Bankruptcy Act, 1883.
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- Sub-section 1(g) and s. 3(1)(i) of our Bankruptcy Act are almost identical. His Lordship emphasised that the words “final judgment” in the sub-section ought to be given their strict and proper meaning, ie:
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a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established

- In the instant case, the debtor has committed a tort of trespass by caveating the applicants’ land. Thus, there was a previously existing liability on his part to the applicants and his liability in respect of that tort was established by the judgment. Under these circumstances, I have no doubt that there was a “final judgment” within the meaning of s. 3(1)(i) of the Act. That being so, the only question now is whether the creditor can issue a bankruptcy notice independently of the costs. His Lordship provided the answer in these words:
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- If these cases are examined, it will be found that there is no decision that a bankruptcy notice cannot be issued for a judgment debt simply because the judgment includes also costs to be taxed, and the costs have not been taxed.
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This case was cited with approval by Tan Sri Mohd. Azmi SCJ in the case of *Low Mun (supra)* at p. 266:

As regards costs, where a judgment is obtained for a certain sum and costs to be taxed, a bankruptcy notice can be issued for the amount of the judgment without the costs ... The costs cannot be included or separately relied on until they have been taxed

In view of the statement of law stated above, the question of waiver in respect of the costs in a claim for judgment debt does not arise. Where a bankruptcy notice claimed interest on the judgment debt to a date specified in the notice, but did not in terms waive or abandon any claim for interest accruing after the date so specified, the Full Court of New South Wales in *Re Farrugia, ex p Deputy Commissioner of Taxation* [1988] 80 ALR 651 said at pp. 657, 658:

But if his Lordship meant that a bankruptcy notice must not only make clear what sum is to be paid in compliance with the notice, and that no further payment is required to secure compliance, but must also expressly abandon any future claim (as, for example, by proof of debt in a subsequent bankruptcy) which the terms of the original judgment might enable the creditor to make, we must respectfully disagree. Vaughan Williams and Stirling LJJ laid down no such proposition, and we can see no basis for it in principle.

In our opinion the bankruptcy notice before us complies with the statutory requirement of s. 41(2), namely, that it requires the debtor to pay the judgment debt in accordance with the judgment. It is true that it does not in terms state that the creditor abandons or waives any claim for interest accruing beyond 26 June 1987, but we see no basis in law for such a requirement.

For the reasons aforesaid, the appeal is dismissed with costs. RO and AO affirmed.

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